91-1305

No.

Supreme Court, U.S.
FILED
FEB 11 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

CARMEN GUEVARA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether a written plea agreement in which the defendant expressly agrees to waive the right to take an appeal from the sentence should be judicially construed so as to preclude the government from exercising its statutory right to appeal from the sentence.

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OCTOBER TERM, 1991

No.

UNITED STATES OF AMERICA, PETITIONER

v.

CARMEN GUEVARA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-3a, is reported at 941 F.2d 1299. The opinion dissenting from the denial of rehearing, App., *infra*, 6a-10a, is reported at 949 F.2d 706.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1991. A petition for rehearing was denied on November 14, 1991. App., *infra*, 4a-5a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

Section 3742 of Title 18 and Rule 11, Fed. R. Crim. P., are reprinted in part in Appendix E, *infra*, 23a-26a.

STATEMENT

1. Beginning in 1988, respondent, posing as an immigration specialist and lawyer, filed a large number of fraudulent political asylum applications with the Immigration and Naturalization Service (INS) for illegal aliens seeking work permits. Respondent charged each illegal alien between $200 and $350 in cash for filing a fraudulent application. Respondent deposited the money into her bank checking account and used the funds to pay for her home and a condominium from which she ran her illegal scheme. The INS sent the work permits either to one of respondent's two addresses or directly to the illegal aliens at addresses they provided. App., *infra*, 19a-20a; 8/3/90 Tr. 5-6 (C.A. App. 49-50); Information 2-7 (C.A. App. 4-9).

In September 1989, INS began an undercover operation directed at respondent. Two confidential informants posing as illegal aliens approached her, and each paid respondent $250 to obtain a fraudulent work permit. Respondent told each informant that she would file a false political asylum application for him. In addition, respondent coached each one concerning the false information that would be submitted on the applications. Respondent also admitted that she had altered the birth certificates of some of her clients so that INS would not learn of their prior arrests.

Surveillance revealed that respondent and an accomplice regularly transported illegal aliens to various locations in the Eastern District of Virginia.

Respondent was observed at the INS office in Arlington, Virginia, with as many as eight customers at one time. In February 1990, law enforcement agents seized documents and financial records showing the receipt of illegal cash payments and their subsequent deposit in respondent's checking account. App., *infra*, 19a-20a.

2. After respondent's scheme was uncovered, she agreed to plead guilty to criminal charges. The plea agreement, App., *infra*, 12a-22a, required her to plead guilty to a one-count criminal information charging her with conspiring (1) to make false statements in violation of 18 U.S.C. 1001, (2) to commit mail fraud, in violation of 18 U.S.C. 1341, and (3) to launder money, in violation of 18 U.S.C. 1956(a)(1)(A)(i), all in violation of 18 U.S.C. 371. Respondent also agreed to forfeit her residence and the proceeds from the sale of her condominium. App., *infra*, 12a-13a, 15a.

The plea agreement expressly provided that respondent was waiving her right to challenge her sentence on appeal; it was silent, however, as to the government's right to appeal the sentence. In pertinent part, the agreement provided as follows, App., *infra*, 13a-14a:

> [Respondent], knowing that [s]he has a right of direct appeal of the sentence under 18 U.S.C. 3742(a) and the grounds listed therein, expressly waives the right to appeal her sentence on those grounds or on any ground. [Respondent] is also aware that her sentence has not yet been determined by the Court. [Respondent] is aware that any estimate of the probable sentencing range that she may have received from her counsel, the government or the probation office is a prediction, not a promise, and is not binding on

> the government, the probation office or the Court. Realizing the uncertainty in estimating what sentences [*sic*] she will ultimately receive, [respondent] knowingly waives her right to appeal the sentence in exchange for the concessions made by the government in this agreement.

The agreement contained an integration clause, stating that the written plea agreement constituted the entire agreement between the parties absent a written supplementation or modification. App., *infra*, 17a. Respondent entered a plea of guilty in accordance with the plea agreement. 6/1/90 Tr. 1-8. (C.A. App. 26-33).

3. A dispute arose at sentencing concerning the correct Sentencing Guideline to use to obtain the appropriate base offense level for respondent's crime. Because one of the objects of respondent's conspiracy was money laundering, the probation office recommended—and the government argued—that the district court should use the Guideline for money laundering, Sentencing Guidelines § 2S1.1, which has a base offense level of 23. Presentence Report Addendum 2-3.[1] By contrast, respondent argued that she committed a simple fraud, so the offense level should be set at 6 under the Guideline for fraud, Sentencing Guidelines § 2F1.1. Presentence Report Addendum 2-3; Position of Defendant With Respect to Sentencing Factors 2-4 (Aug. 2, 1990) (C.A. App. 35-37); 8/3/90 Tr. 2-4 (C.A. App. 46-48).

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[1] Respondent was charged with a multiple object conspiracy, so the probation office grouped all of the substantive offenses pursuant to Sentencing Guidelines § 3D1.2. The probation office then applied the money laundering Guideline, since it produced a higher offense level than the fraud Guideline. *Id.* § 3D1.3(b).

The district court agreed with respondent and therefore applied the Sentencing Guideline for fraud to set respondent's base offense level. 8/3/90 Tr. 8 (C.A. App. 52). The court determined that respondent's Guidelines sentencing range was 6-12 months' imprisonment, based on offense level 10 and a criminal history category of I.[2] The court went on to find, however, that respondent's fraud was unusually broad and sophisticated. Based on that finding, the court departed upward from the Guidelines range and sentenced respondent to 28 months' imprisonment, to be followed by three years' supervised release. 8/3/90 Tr. 8-9 (C.A. App. 52-53).

4. The government filed a notice of appeal, seeking to challenge the district court's refusal to use the money laundering Guideline in calculating respondent's sentence. After the case was briefed and argued, the court of appeals sua sponte dismissed the

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[2] The court arrived at offense level 10 in the following manner: The court started with the base offense level of 6 for fraud, Sentencing Guidelines § 2F1.1; increased the base offense level by six levels because the amount of the fraud was more than $70,000 but less than $120,000, *id.* § 2F1.1(b)(1)(G); added a two-level enhancement because the offense involved more than minimal planning, *id.* § 2F1.1(b)(2)(A); but then subtracted two levels because respondent had accepted responsibility, *id.* § 3E1.1 8/3/90 Tr. 8 (C.A. App. 52). In calculating the offense level, the district court made an arithmetical error. The offense level should have been 12, not 10; level 12 has a sentencing range of 10-16 months' imprisonment. The district court also did not refer to the probation officer's recommendation that respondent should receive a two-level increase because she played a supervisory role in the offense, Sentencing Guidelines § 3B1.1(c). App., *infra*, 6a n.1 (Wilkins, J., dissenting from the denial of rehearing en banc). That increase would have put respondent at offense level 14, which has a sentencing range of 15-21 months' imprisonment.

government's appeal. App., *infra*, 1a-3a.[3] The court acknowledged that in *United States* v. *Wiggins*, 905 F.2d 51 (4th Cir. 1990), it had upheld a plea agreement requiring the defendant to waive his right to challenge his sentence on appeal over the claim that such waivers are invalid. *Wiggins* upheld such a waiver, the court indicated, because "it preserves the finality of judgments and sentences imposed pursuant to valid pleas of guilty." App., *infra*, 2a-3a (quoting *Wiggins*, 905 F.2d at 54). The court nonetheless ruled that a plea agreement containing an express waiver of a defendant's right to challenge his sentence on appeal would be deemed to include a corresponding waiver of the government's right to appeal the sentence as well. The court's entire reasoning in this respect was as follows, App., *infra*, 3a:

> The finality of judgments and sentences imposed is no more preserved by appeals by the government than by appeals by the defendant, and it strikes us as far too one-sided to construe the plea agreement to permit an appeal by the gov-

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[3] The court of appeals reached out to decide a question that was not before the court, since respondent had neither moved to dismiss the government's appeal nor argued that the plea agreement contained an implied waiver of the government's appeal right. Br. for Appellee 1, 4-15. Respondent did argue that the government's notice of appeal was untimely because it was filed on September 4, 1990, 32 days after the district court entered judgment, Br. for Appellee 4-5. That argument lacked merit, however, as we explained in our reply brief in the court of appeals, U.S. Reply Br. 2-3. The district court entered its judgment and commitment order on August 3, 1990. C.A. App. 2. The last day of the following 30-day period (September 2) fell on a Sunday, and the next Monday (September 3) was Labor Day, a federal holiday. The government therefore complied with Fed. R. App. P. 3 and 4(b) when it filed its notice of appeal the next day, September 4.

> ernment for a fancied mistake by the district court, as here, but not to permit an appeal on similar grounds by the defendant, which *Wiggins* held to be precluded. That being the case, we are of the opinion that such a provision against appeals must also be enforced against the government, which must be held to have implicitly cast its lot with the district court, as the defendant explicitly did.

5. The government sought rehearing en banc, and the court of appeals denied the suggestion by an 8-4 vote. App., *infra*, 4a. Judge Wilkins filed a dissenting opinion, in which he was joined by Judges Wilkinson, Niemeyer, and Luttig. *Id.* at 6a-10a. Reasoning that contract law principles apply to the interpretation and enforcement of plea agreements, Judge Wilkins and his dissenting colleagues concluded that a court is entirely without authority to imply in a plea agreement a condition to which the government did not agree. *Id.* at 7a-8a.[4] In his view, the panel "rewrote the integrated plea agreement contract by adding covenants the parties did not mention or intend." *Id.* at 9a. Judge Wilkins noted that respondent voluntarily entered into the plea agreement and that the record did not suggest that the government intended to waive its right to appeal the sentence. *Id.* at 9a-10a.

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[4] Judge Wilkins also explained that the panel had erred in denigrating the government's claim of error as nothing more than "a fancied mistake by the district court." App., *infra*, 3a. In Judge Wilkins' view, the government was correct in arguing that the district court should have used the money laundering Guideline, instead of the fraud Guideline, when calculating respondent's sentence. *Id.* at 6a-7a.

REASONS FOR GRANTING THE PETITION

The court of appeals dismissed the government's appeal in this case on the ground that a plea bargain in which the defendant expressly agrees to waive his statutory right to challenge his sentence on appeal necessarily contains an implied waiver by the government of its parallel right to take an appeal from the sentence imposed by the district court. The court of appeals did not identify the source of this novel rule, and we know of none. By implying in the plea agreement a term to which the government nowhere agreed, the Fourth Circuit's decision violated the well-settled principle that federal courts are not free to rewrite plea agreements by implying in them terms to which the parties did not consent. Since the error in the court of appeals' ruling and rationale is so plain, we urge this Court summarily to reverse the judgment below.

1. The decision below is inconsistent with this Court's decision in *United States* v. *Benchimol*, 471 U.S. 453 (1985). In that case, the Court held that the federal courts cannot revise a plea agreement to create terms to which the parties did not agree. The defendant in *Benchimol* pleaded guilty pursuant to a plea agreement under which the government agreed to recommend probation if the defendant made restitution. At sentencing, the prosecutor concurred in defense counsel's representation that the government recommended probation with restitution. Thereafter, the defendant collaterally attacked his conviction on the ground that the prosecutor had failed to comply with the plea agreement. The court of appeals agreed, holding that the prosecutor had erred by failing to explain the reasons for his sentencing recommendation, which, the court of appeals believed, left

the sentencing court with the impression that the prosecutor was not enthusiastic about his recommendation. 471 U.S. at 453-455.

This Court summarily reversed, holding that the government did not violate the plea agreement. 471 U.S. at 455-456. The Court observed that Rule 11(e), Fed. R. Crim. P., provides an elaborate formula for the negotiation of plea bargains, including sentencing recommendations, but that the Rule is limited to agreements that the parties make in fact. The agreement reached by the parties in *Benchimol* required the prosecutor to recommend in favor of probation, but it did not require him to state the reasons for his recommendation or to make an "enthusiastic" recommendation. Because the prosecutor complied with the agreement by recommending probation, the Court held that the court of appeals had erred by "imply[ing] as a matter of law a term which the parties themselves did not agree upon." 471 U.S. at 456.[5]

That analysis is directly applicable here. The parties in this case made an agreement, the terms of which were simple and clear: respondent waived her right to appeal her sentence; the government did not. As in *Benchimol*, the court of appeals believed the bargain was not sufficiently favorable to the defendant, so the court implied a term that did not appear in the agreement. In so doing, the court of appeals plainly erred, disregarding this Court's admonition

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[5] The Court in *Benchimol* made clear that its decision rested on the court of appeals' error in interpreting the plea agreement, not on the ground that collateral review of a conviction is more limited than review on direct appeal. 471 U.S. at 456-457. Accordingly, the fact that this case arises on direct appeal rather than collateral attack does not distinguish this case from *Benchimol*.

in *Benchimol* against implying in a plea agreement terms that the parties did not agree upon.

2. The court of appeals' decision is also contrary to the analysis of the First Circuit in *United States* v. *Anderson*, 921 F.2d 335 (1990). The plea agreement in that case specifically acknowledged the defendant's right to appeal his sentence, but it was silent regarding the government's right to appeal. The defendant argued that by virtue of the government's failure expressly to reserve its right to appeal from sentence, the government had waived that right. Relying on *Benchimol*, the First Circuit rejected that argument and held that nothing in the plea agreement could be read as a waiver—express or implied—of the government's right to appeal the sentence. The court observed that it "would open a Pandora's jar" to accept the defendant's argument, and "to adopt so free-form an interpretation of plea bargains." 921 F.2d at 338.

That analysis is squarely at odds with the approach used by the court of appeals in this case. The court in *Anderson* was unwilling to interpret silence in the agreement as an implied waiver of the government's statutory right to appeal from the sentence. Finding nothing in the content or context of the agreement to support such an interpretation, the court properly refused to reconstruct the plea agreement in an effort to make it more symmetrical. In this case, by contrast, the court of appeals found the waiver term of the agreement too "one-sided" for its taste and simply reformed the agreement to include an equivalent waiver on behalf of the government. That course of action has no support in any principle of law or decision of this Court.

3. The Due Process Clause does not prohibit a defendant from entering into a plea agreement in

which he waives his right to challenge his sentence on appeal, even when the government retains its right to appeal the sentence. This Court has consistently held that plea bargaining is a legitimate practice within the criminal process. See, *e.g.*, *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977). As long as the defendant's plea of guilty is voluntary and the defendant is aware of the direct consequences of his plea, the Constitution leaves plea agreements for the parties to work out in the "give and take" of bargaining. *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). See, *e.g.*, *Mabry* v. *Johnson*, 467 U.S. 504 (1984); *Santobello* v. *New York*, 404 U.S. 257 (1971); *Brady* v. *United States*, 397 U.S. 742 (1970). Relying on that principle, the Fourth and Ninth Circuits have ruled that a defendant's waiver of his right to appeal his sentence is valid and enforceable. *United States* v. *Wiggins*, 905 F.2d at 53; *United States* v. *Navarro-Botello*, 912 F.2d 318 (9th Cir. 1990), petition for cert. pending, No. 91-6833; *United States* v. *Bolinger*, 940 F.2d 478, 479-480 (9th Cir. 1991). Those courts are correct.

Assuming that there are some types of consideration that the government cannot demand in return for accepting a defendant's guilty plea, a defendant's waiver of his right to challenge his sentence on appeal clearly is not among them. A defendant who pleads guilty—whether or not as part of a plea bargain—waives his constitutional rights to force the government to prove his guilt beyond a reasonable doubt, to invoke the privilege against compulsory self-incrimination, to have a jury determine his guilt or innocence, to confront the witnesses against him, and to present witnesses in his defense. *Boykin* v. *Alabama*, 395 U.S. 238 (1969). By contrast, a defendant's right to appeal his conviction or sentence is

purely statutory, not constitutional, in nature. *McKane* v. *Durston*, 153 U.S. 684, 687 (1894); *Andrews* v. *Swartz*, 156 U.S. 272, 275 (1895).[6] If a defendant can waive constitutional trial rights by pleading guilty, then he can waive a purely statutory right to appeal his sentence. See *United States* v. *Clark*, 865 F.2d 1433, 1437 (4th Cir. 1989) (en banc) ("If defendants can waive fundamental constitutional rights such as the right to counsel or the right to a jury trial, surely they are not precluded from waiving procedural rights granted by statute.") (citations omitted).

The court of appeals purported to justify its action on the ground that, in its view, it would be "too one-sided" to permit the government to appeal the sentence imposed on respondent while barring respondent from taking a similar appeal. App., *infra*, 3a. But a federal court is not authorized to rewrite a plea agreement simply because one term favors the government. By their nature as agreed-upon bargains, plea agreements will contain some terms that favor the prosecution and others that favor the defendant. In some instances, a plea agreement will predominantly favor one party or another. But the fact that the government has negotiated an advantageous plea bargain in a particular respect is no reason to set it aside or to imply a term to which the parties did not agree. As this Court explained in *Bordenkircher* v. *Hayes*, 434 U.S. at 363, "in the 'give and take' of plea bargaining, there is no such element of punishment or retaliation so long as the

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[6] This Court has reiterated the holdings in *McKane* and *Andrews* on numerous occasions. See, *e.g.*, *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Abney* v. *United States*, 431 U.S. 651, 656 (1977); *Estelle* v. *Dorrough*, 420 U.S. 534, 536 (1975); *Ross* v. *Moffitt*, 417 U.S. 600, 606 (1974); *Griffin* v. *Illinois*, 351 U.S. 12, 18, 20-21 (1956).

accused is free to accept or reject the prosecution's offer." See also *Mabry* v. *Johnson*, 467 U.S. at 508; *Corbitt* v. *New Jersey*, 439 U.S. 212, 219-220 (1973). Since respondent was free to reject the plea agreement, the court below erred in substituting its notion of what the plea agreement should have required in place of the express terms of the agreement reached by the parties.

Respondent could not have been misled into pleading guilty on the assumption that, in the court of appeals' words, the government had also cast its lot with the district court. App., *infra*, 3a. The plea agreement was entirely silent concerning any waiver by the government of its right to appeal from the sentence. The combination of (1) an express waiver of respondent's right to appeal the sentence and (2) the omission of any corresponding waiver of the government's right to appeal provided a clear indication that the government sought to preserve its right to appeal an adverse sentencing decision. See *United States* v. *Anderson*, 921 F.2d at 338. Telling proof that respondent herself did not construe the plea agreement as a waiver of the government's right to appeal lies in the fact that she did not advance any such argument in the court of appeals. The court of appeals simply made up the "issue" and then crafted an undefined principle of fairness. Respondent's deafening silence on appeal powerfully refutes any notion that she was somehow misled into believing that both parties had decided to forgo any appeal.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below should be summarily reversed.

Respectfully submitted.

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FEBRUARY 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5840

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT

v.

CARMEN GUEVARA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, District Judge.
(CR-90-190)

Argued: April 11, 1991

Decided: August 12, 1991

Before RUSSELL and WIDENER, Circuit Judges, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

Dismissed by published opinion, Judge Widener wrote the opinion, in which Judge Russell and Judge Michael joined.

OPINION

WIDENER, Circuit Judge:

Carmen Guevara entered into a plea agreement with the government under which she agreed to plead guilty to conspiracy to defraud the Immigration and Naturalization Service of the United States under 18 U.S.C. § 1001, to commit mail fraud under 18 U.S.C. § 1341, and to conduct laundering of money instruments under 18 U.S.C. § 1956(a)(1)(A)(i), all in violation of 18 U.S.C. § 371. She further agreed to forfeit her home and the $4,651.00 proceeds from the sale of her condominium. She pleaded guilty, an order of forfeiture was entered, and a deed of the house to the government was executed to give effect to the agreement. Guevara was then sentenced to 28 months of imprisonment to be followed by three years of supervised release. The severity of this sentence not to its liking, the government appealed.

The plea agreement contains a provision whereby ". . . defendant knowingly waives her right to appeal the sentence in exchange for the concessions made by the government in this agreement," and another provision that ". . . the defendant, knowing that he has a right of direct appeal of the sentence under 18 U.S.C. 3742(a) and the grounds listed therein, expressly waives the right to appeal her sentence on those grounds or on any ground." Similar provisions waiving a defendant's right to appeal have been upheld in *United States v. Wiggins*, 905 F.2d 51 (4th Cir. 1990). In that case, we considered language indistinguishable from that which we have quoted above and gave as a reason for our decision that "[t]he government has added the waiver language to its standard plea precisely because it preserves the

finality of judgments and sentences imposed pursuant to valid pleas of guilty." *Wiggins*, 905 F.2d at 54. The finality of judgments and sentences imposed is no more preserved by appeals by the government than by appeals by the defendant, and it strikes us as far too one-sided to construe the plea agreement to permit an appeal by the government for a fancied mistake by the district court, as here, but not to permit an appeal on similar grounds by the defendant, which *Wiggins* held to be precluded. That being the case, we are of opinion that such a provision against appeals must also be enforced against the government, which must be held to have implicitly cast its lot with the district court, as the defendant explicitly did.

Accordingly, the government's appeal is

DISMISSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5840

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

versus

CARMEN GUEVARA, DEFENDANT-APPELLEE

[Filed Nov. 14, 1991]

ORDER

Upon a request for a poll of the court on the petition of the Government for rehearing en banc, Judges Wilkinson, Wilkins, Niemeyer, and Luttig voted to rehear the case en banc, while Judges Ervin, Russell, Widener, Hall, Phillips, Murnaghan, Sprouse and Hamilton voted to deny rehearing en banc.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and the same hereby is, denied.

The panel considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Russell and Judge Michael.

/s/ H. E. Widener, Jr.
H. E. WIDENER, JR.
For the Court

WILKINS, Circuit Judge, dissenting:

In sua sponte dismissing the appeal, the panel held that an explicit waiver of appeal in a plea agreement by a defendant must be construed as an implicit waiver of the right of the government to appeal. *United States v. Guevara*, 941 F.2d 1299 (4th Cir. 1991). Citing no authority to support its decision, and rejecting the principles of contract law this court has consistently held to apply to plea agreements, the panel found that it would be "far too one-sided to construe the plea agreement to permit an appeal by the government" and apparently relied on its own sense of justice as the sole basis for rewriting the agreement. *Id.* at 1299. I respectfully dissent from the order denying the suggestion for rehearing en banc.

I.

Guevara pled guilty to a one-count indictment charging conspiracy to conduct money laundering, to commit mail fraud, and to defraud the Immigration and Naturalization Service. In the presentence report the probation officer correctly assigned an offense level for each of the three offenses under the conspiracy, *see* United States Sentencing Commission, *Guidelines Manual*, § 1B1.2(d), 1B1.2, comment. (n.4) (Nov. 1989),[1] and grouped them, *id.* at § 3D.1.2(d). The probation officer then used the offense guideline that produced the highest offense level, the money laundering offense, to arrive at level 26.

[1] The probation officer made a scrivener's error when calculating the offense levels for the fraud offenses. The offense levels should have each totaled 14, while the probation officer listed the totals as 10.

Id. at § 3D1.3(b). Adjusted for Guevara's acceptance of responsibility and the statutory maximum sentence for conspiracy, the correct guideline range was 51-60 months. *Id.* at § 3E1.1(a); 18 U.S.C.A. § 371 (West 1966).

Rejecting the recommendation of the probation officer, the district court incorrectly sentenced Guevara only for the less serious fraud offenses. The court assigned an adjusted offense level of 10 with a resulting guideline range of 6-12 months. To reflect the scope and sophistication of the fraud scheme, the court departed upward and sentenced Guevara to 28 months imprisonment and three years of supervised release.

Section 3D1.3(b) requires that when "counts involve offenses of the same general type to which different guidelines apply," the court must "apply the offense guideline that produces the highest offense level." The district court disregarded the plain language of this guideline and failed to adhere to the law of this circuit. *United States v. Hummer*, 916 F.2d 186, 190-91 (4th Cir. 1990) ("[T]he offense level of the group is calculated by determining the adjusted offense level for the most serious count within the group."), *cert. denied*, 111 S. Ct. 1608 (1991). Rather than raise, as the panel labeled it, "a fancied mistake by the district court," *Guevara*, 941 F.2d at 1299, the government, in fact, brought a meritorious appeal of a misapplication of the sentencing guidelines.

II.

It is well recognized that contract-law principles apply to the interpretation and enforcement of plea agreements. *See, e.g., United States v. Fentress*, 792 F.2d 461, 464 (4th Cir. 1986); *see also United States*

v. Wade, 936 F.2d 169, 173 (4th Cir. 1991) ("[W]e apply the general law of contracts to determine whether the government has breached the agreement."), *petition for cert. filed*, —— U.S.L.W. —— (U.S. Sept. 10, 1991) (No. 91-5771); *United States v. Conner*, 930 F.2d 1073, 1076 (4th Cir. 1991) ("Drawing largely on the law of contracts in the commercial context, the courts have developed a fairly large body of law to guide the judicial interpretation of plea agreements."), *petition for cert. filed*, —— U.S.L.W. —— (U.S. July 17, 1991) (No. 91-5226); *United States v. Wiggins*, 905 F.2d 51, 54 (4th Cir. 1990) ("Wiggins waived his right [to appeal] for the purpose of obtaining certain concessions from the government and he may not now ignore his part of the bargain."). When the government and a defendant enter into a plea agreement as a complete statement of their obligations, it may not be supplemented with unmentioned terms at a later date. *Fentress*, 792 F.2d at 464. And, "[w]hile the government must be held to the promises it made, it will not be bound to those it did not make." *Id.* For a court to imply into a plea agreement a term to which the government did not agree is an error of law. *See United States v. Benchimol*, 471 U.S. 453, 456 (1985) (per curiam).

Recently, a similar issue was before the Court of Appeals for the First Circuit. It held that omission of language expressly preserving the statutory right of the government to appeal did not constitute an implied waiver of that right. *United States v. Anderson*, 921 F.2d 335 (1st Cir. 1990). Relying on Fourth Circuit authority, the court found that "[t]o read the Agreement, *ex silentio*, to include a waiver by the government of its right of appeal would give

defendant more than is reasonably due." *Id.* at 338 (citing *Fentress*, 792 F.2d at 464). The court stated:

> Consistent with contract-law principles, we look to the language of the document, focusing squarely within its four corners. . . . If defendant had wanted to condition his plea on the conferral of an incremental benefit—the prosecution's agreement to forgo its right to appeal any sentence imposed—he could have insisted that such a term be made part of the Agreement. He did not do so.

Id. at 337-38 (citation omitted).

Moreover, by dismissing the appeal by the government of Guevara's sentence, the panel has in effect, at least for purposes of this case, nullified the Sentencing Reform Act and transported this circuit back to a time when district courts had unbridled discretion in sentencing, insulated from appellate review. The Act provides the government the right to appeal "an otherwise final sentence if the sentence . . . was imposed as a result of an incorrect application of the sentencing guidelines." 18 U.S.C.A. § 3742(b) (West Supp. 1991). Like the similar right granted to a defendant by the Act, in the absence of an express waiver this right should be recognized and respected. Ignoring this, the panel rewrote the integrated plea agreement contract by adding covenants the parties did not mention or intend.

The record provides no evidence that Guevara entered into the agreement involuntary or without full knowledge and understanding or its provisions; nor does the record offer any indication that the government intended to waive its statutory right to appeal. Clearly, the defendant harbored no such thoughts for

Guevara did not raise this issue on appeal. This plea agreement should not be read to imply unspoken promises—especially in light of paragraph 13 of the agreement which states:

> This written agreement constitutes the complete plea agreement between the United States, the defendant and her counsel. No promises or representations have been made by the United States except as set forth herein. Defendant acknowledges that no threats have been made against her and that she is pleading guilty freely and voluntarily because she is guilty. Any modification of this plea agreement shall be valid only as set forth in writing in a supplemental or revised plea agreement signed by all parties.

The terms and consequences of this plea bargain should be respected, and we should refrain from redrafting it in order to indulge our own notions of fairness.

Judges Wilkinson, Niemeyer, and Luttig authorize me to state that they join in this opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5840

D/CT#: CR-90-190

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

CARMEN GUEVARA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Eastern District of Virginia at Alexandria

JUDGMENT

This case was heard by the Court on the record from the United States District Court for the Eastern District of Virginia at Alexandria and was argued by counsel.

The Court dismisses the appeal from the judgment of the district court.

/s/ John M. Greacen
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Criminal No. ————

UNITED STATES OF AMERICA

v.

CARMEN GUEVARA

PLEA AGREEMENT

The United States of America, by and through its attorneys Henry E. Hudson, United States Attorney for the Eastern District of Virginia, and Christine F. Wright, Special Assistant United States Attorney and the defendant, CARMEN GUEVARA and her attorney, Gregory Bruce English, Esquire, state that pursuant to Rule 11, Federal Rules of Criminal Procedure, have reached an agreement which is set forth below in its entirety.

1. The defendant, CARMEN GUEVARA, agrees to enter a plea of guilty to a one-count criminal information. Count One charges that CARMEN GUEVARA did unlawfully, willfully and knowingly combine, conspire, confederate and agree with other coconspirators to violate Title 18, United States Code, Section 1001 (fraud against the United States); Title 18, United States Code, Section 1341 (mail fraud);

Title 18, United States Code, Section 1956 (laundering of monetary instruments) in violation of Title 18, United States Code, Section 371. This offense carries a penalty of a fine of not more than $25,000 or imprisonment for not more than five years or both. There also must be imposed a period of supervised release of at least two years but not more than three years.

2. Prior to or at the time of sentencing, defendant will pay to the United States Department of Justice a special assessment of $100.00, pursuant to Title 18, United States Code, Section 3013(a)(2)(A). It is further understood that pursuant to Section 5E4.2 (i) of the *Sentencing Guidelines and Policy Statements* the Court may impose an additional fine amount that is sufficient to pay the costs to the government of any imprisonment, term of supervised release and probation if any be ordered.

3. The defendant is aware that her sentence will be imposed in conformity with the *Federal Sentencing Guidelines and Policy Statements.* Defendant is aware that the constitutionality of the Guidelines has been challenged on various grounds, that courts have reached differing results in ruling on these challenges, and that the supreme Court has not yet resolved every issue that might be raised. Defendant is also aware that a sentence imposed under the Guidelines does not provide for parole. Knowing these facts, defendant agrees that this Court has jurisdiction and authority to impose any sentence within the statutory maximum set for his offense(s), including a sentence determined under the Sentencing Guidelines. In addition, the defendant, knowing that he has a right of direct appeal of the sentence under 18 U.S.C. 3742(a) and the grounds listed therein, expressly waives the right

to appeal her sentence on those grounds or on any ground. The defendant is also aware that her sentence has not yet been determined by the Court. Defendant is aware that any estimate of the probable sentencing range that she may have received from her counsel, the government or the probation office is a prediction, not a promise, and is not binding on the government, the probation office or the Court. Realizing the uncertainty in estimating what sentences [sic] she will ultimately receive, defendant knowingly waives her right to appeal the sentence in exchange for the concessions made by the government in this agreement.

4. The government reserves the right to carry out its responsibilities under this Court's Policy Regarding Procedures to be followed in Guidelines Sentencing. Specifically, the government reserves the right (1) to bring its version of the facts of this case to the attention of the probation office in connection with that office's preparation of a presentence report; (2) to dispute sentencing factors or facts material to sentencing in the presentencing report; and (3) to seek resolution of such factors of facts in conference with opposing counsel and the United States Probation Office, as contemplated in this Court's Policy Regarding Procedures to be Followed in Guidelines Sentencing. Moreover, the government reserves the right to file a pleading entitled "Positions of the Parties with respect to Sentencing Factors" in accordance with Section 6A1.2 of the *Sentencing Guidelines and Policy Statements* (Oct. 1987) and paragraphs 5 and 6 of this Court's Policy Regarding Procedures to be Followed in Guidelines Sentencing.

5. The parties to this agreement understand that the sentence to be imposed on the defendant is within

the sole discretion of the sentencing judge, as prescribed by the Sentencing Guidelines and statutory maximums. This plea is entered into and presented to the Court pursuant to Rule 11 of the Federal Rules of Criminal Procedure, and the United States Attorney's Office cannot and does not make any promise or representation concerning what sentence the defendant will receive. Both the United States and the defendant are free to allocute at sentencing.

6. As a further condition of this plea agreement, the defendant expressly agrees and stipulates that she possesses forfeitable assets identified as $4,651.00 in United States currency from the proceeds of the sale of 489 North Armistead Street, Apartment 102, Alexandria, Virginia 22312 and the real property and premises known as 5221 Grantham Street, Springfield, Virginia, 22151, and further agrees that upon this court's acceptance of this plea agreement, these assets will be forfeited to the United States.

7. The defendant agrees to execute any and all documents necessary or proper to convey clear title to the property to the United States. The defendant further agrees to the entry of an Order of Forfeiture forfeiting the aforementioned property pursuant to Title 18, United States Code, Section 982 and agrees to hold the United States harmless from any claims concerning any interest in the forfeited property from any of her family members.

8. It is further a part of this plea agreement that the defendant must fully and truthfully cooperate with the United States Government and any state or local governments in their investigation of immigration fraud. This cooperation is to include, but is not limited to, truthful and complete debriefings of the defendant's knowledge concerning the above-men-

tioned unlawful activities and other unlawful activities. In this connection, the defendant understands that she must fully disclose and provide information to the Government, including any books, papers or documents that are of evidentiary value to the Government's investigations.

9. It is a further part of this plea agreement that the United States agrees not to use against the defendant in any criminal prosecution anything she says in response to questions by law enforcement agents and government attorneys, unless she should commit perjury or make false or intentionally misleading statements. The scope of this use immunity protection shall be co-extensive with that found in Title 18, United States Code, Section 6001 *et seq.*, and Section 1B1.8 of the *Sentencing Guidelines.*

10. If the defendant knowingly and willfully misleads or lies to any government agent, she will be in violation of this plea agreement and the United States thereafter may prosecute her for obstruction, perjury and false statements pursuant to Title 18, United States Code, Sections 1503, 1510, 1621, 1623 and 1001, as well as for any other criminal violations including the underlying charge. In any such prosecutions, the defendant understands that the government is free to use against her all of her statements and documents produced pursuant to this agreement.

11. In return for the complete fulfillment by CARMEN GUEVARA of all other obligations under this agreement, the United States Attorneys Office for the Eastern District of Virginia agrees not to further prosecute CARMEN GUEVARA or her mother, Magda Giles, in the Eastern District of Virginia for other violations of federal criminal law relating to CARMEN GUEVARA or Magda Giles that

arose out of this investigation which are presently known to this United States Attorneys Office or could become known from the evidence seized from the home of CARMEN GUEVARA, and are not crimes of violence.

12. The attached Statements of Facts is hereby incorporated herein and the parties agree that the facts set out in the attached Statements of Facts are accurate in every respect.

13. This written agreement constitutes the complete plea agreement between the United States, the defendant and her counsel. No promises or representations have been made by the United States except as set forth herein. Defendant acknowledges that no threats have been made against her and that she is pleading guilty freely and voluntarily because she is guilty. Any modification of this plea agreement shall be valid only as set forth in writing in a supplemental or revised plea agreement signed by all parties.

Respectfully submitted,

HENRY E. HUDSON
United States Attorney

By: /s/ Christine F. Wright
CHRISTINE F. WRIGHT
Special Assistant
United States Attorney

APPROVED:

/s/ Kenneth E. Melson
KENNETH E. MELSON
First Assistant
United States Attorney

I have consulted with my attorney and fully understand all my rights with respect to the offenses charged in the information that is being filed against me, and with respect to all the offenses with which I might be charged. I have read this plea agreement and carefully reviewed every part of it with my attorney. I understand this agreement, and I voluntarily agree to it.

Date: 5/31/90

/s/ Carmen Guevara
CARMEN GUEVARA
Defendant

I am CARMEN GUEVARA's attorney. I have fully explained to her her rights with respect to the offenses charged in the information which is being filed against her and with respect to all the offenses with which she might be charged. I have carefully reviewed every part of this plea agreement with her. To my knowledge, her decision to enter into this agreement is an informed and voluntary one.

Date: 5/31/90

/s/ G. English
GREGORY BRUCE ENGLISH, Esquire
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Criminal No. ————

UNITED STATES OF AMERICA

v.

CARMEN GUEVARA

STATEMENT OF FACTS

If this case were to go to trial, the Government would prove the following facts beyond a reasonable doubt, which are offered as evidence in support of the guilty plea of the defendant, CARMEN GUEVARA.

Beginning in 1988, CARMEN GUEVARA began falsely holding herself out as an attorney and an immigration specialist for the purpose of making cash profits by filing fraudulent political asylum applications for illegal aliens seeking work permits.

The Immigration and Naturalization Service initiated an undercover operation in September of 1989 wherein two separate confidential informants posing as illegal aliens made contact with GUEVARA. The several meetings and phone calls to GUEVARA were consensually monitored, recorded and transcribed. Both of the INS confidential informants paid GUEVARA $250.00 and GUEVARA advised that in order to get a "work permit" for them she would file fraudulent political asylum applications with the INS.

GUEVARA coached the informants regarding the nature of the false information she had placed on the applications. GUEVARA admitted that she altered birth certificates so that her customers could evade detection if they had prior arrests. At all times, GUEVARA represented she was a lawyer.

Surveillance conducted by the INS would reveal that the illegal scheme was GUEVARA's only source of income. She would regularly have a co-conspirator pick up illegal alien "customers" in a van bearing Virginia tags SJ 608 and would transport them to various locations in the Eastern District of Virginia. GUEVARA was observed at INS in Arlington, Virginia with as many as eight "customers" at one time.

INS employees in the examinations section of the Arlington office would testify that GUEVARA and her co-conspirator, Magda Giles, filed at least 57 fraudulent political asylum applications with the INS between September, 1989 and February, 1990.

On February 9, 1990, agents of the INS and IRS executed a search warrant upon the residence and office of GUEVARA. As a result of the search, numerous documents were seized. These documents, which include receipt books of cash amounts received, would corroborate the receipt of illicit cash payments and the subsequent bank deposits of these proceeds.

Agents of the INS and IRS have examined bank records relating to GUEVARA and would testify that she directly promoted and facilitated her illegal scheme with the illicit proceeds.

Agents of the U.S. Postal Service conducted mail covers at the two residences owned by GUEVARA at the time and would testify that numerous aliens received mail from the INS at these addresses. Additionally, both the INS confidential informants would

testify that GUEVARA mailed to them copies of the fraudulent applications she had filed for them at the INS office.

Respectfully submitted,

HENRY E. HUDSON
United States Attorney

By: /s/ Christine F. Wright
CHRISTINE F. WRIGHT
Special Assistant
United States Attorney

After consulting with my attorney, and pursuant to the plea agreement entered into this day between the defendant, CARMEN GUEVARA and the United States, I hereby stipulate that the above Statement of Facts is true and accurate, and that had the matter proceeded to trial, the United States would have proved the same beyond a reasonable doubt.

Date: 5/31/90

/s/ Carmen Guevara
CARMEN GUEVARA
Defendant

I am CARMEN GUEVARA's attorney. I have carefully reviewed the above Statement of Facts with her. To my knowledge, her decision to stipulate to these facts is an informed and voluntary one.

Date: 5/31/90

/s/ G. English
GREGORY BRUCE ENGLISH
Counsel for Defendant Guevara

APPENDIX E

1. At the time respondent was sentenced, 18 U.S.C. 3742 (1988) provided in part as follows:

> (a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term or imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) then the maximum established in the guideline range; or
>
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.
>
> (b) Appeal by the Government.—The Government, with the personal approval of the Attorney General or the Solicitor General, may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term or imprisonment, probation, or supervised release than

the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) then the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

Congress amended 18 U.S.C. 3742(b) in 1990. The amended version reads as follows:

(b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term or imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) then the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

2. Rule 11, Fed. R. Crim. P., provides in part as follows:

(a) Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

* * * * *

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing

of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

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